

<b>COMPLIANCE BOARD OPINION NO. 03-7</b>
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June 6, 2003

*Mr. Davis Maloy*

The Open Meetings Compliance Board has considered your complaint concerning the Board of Directors of the Baltimore Area Convention and Visitors Association, Inc. (“BACVA”). The complaint specifically alleged that BACVA has failed to provide notice of its meetings in accordance with the Open Meetings Act. The underlying – and determinative – issue raised by the complaint, however, is whether BACVA is subject to the provisions of the Act. The complaint requested that we reverse a 1996 opinion in which we concluded that BACVA was not subject to the Act.

For the reasons explained below, we affirm our 1996 decision. In our view, BACVA is not a “public body,” as defined under the Open Meetings Act. Thus, neither the substantive nor procedural requirements of the Act, including the public notice requirement, apply. In reaching this decision, however, we reiterate our view that, because of the public’s interest in the decisions of BACVA, the impact of its decisions on the region, and its role in implementing City policy, BACVA should welcome public observation of its decision-making process.

## **I**

### **Complaint and Response**

The complaint alleged that BACVA repeatedly violates the Open Meetings Act by its failure to provide proper notice of its meetings. *See* §10-506.<sup>1</sup> The complaint requested that we overturn our prior opinion holding that the Act does not apply to BACVA. Compliance Board Opinion 96-14 (December 19, 1996), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 196. First, citing a definition of “board” as quoted in our 1996 opinion,<sup>2</sup> the

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5, of the State Government Article, Annotated Code of Maryland.

<sup>2</sup> In our 1996 opinion, we quoted a dictionary definition of “board” as “[a]n official or representative body organized to perform a trust or to execute official or representative  
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complaint contended that “while BACVA may not have been created according to [the Act’s] definition, it has evolved and *pro-actively* accepts the role of performing the governmental function of marketing and promoting the city using funds dedicated and allocated specifically in [Article II, §40(e)(2) of] the Baltimore City Charter.” (emphasis in original).<sup>3</sup> Second, the complaint noted that BACVA “has a full understanding of and has openly accepted its role in this [governmental] function ... by taking advantage of benefits ... normally reserved for a truly Quasi-Governmental Agency.” The complaint cited, as examples, BACVA’s use of the City’s Finance Department and its “acting as the Official City Agency performing a mandated function.” Third, after agreeing with our prior interpretation of the purpose underlying §10-502(h)(2), the complaint suggested that the amended definition ought to be construed so that it would extend to boards, commissions, or committees that “perform government duties prescribed by law regardless of how they were created.” The complaint suggested that the Legislature’s intent in enacting the 1991 amendments was to “ensure that the oversight of government functions cannot be circumvented by assigning the tasks to a board ... that was not created *or* assigned through informal means.”<sup>4</sup>

In a timely response submitted on behalf of BACVA, Steven E. Bers, Esquire, described BACVA as a private entity, with approximately 500 dues-paying members within the hospitality industry, that is funded by both public and private membership revenue. BACVA argued that nothing has changed since our 1996 opinion that would justify the opposite conclusion about BACVA’s status. In essence, BACVA’s position is that it is not a “public body” as that term is defined in the Open Meetings Act. First, BACVA emphasized that it was not created by any legal instrument enumerated in §10-502(h)(1). Second, BACVA argued that §10-502(h)(2) cannot be interpreted as extending to an entity like BACVA:

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<sup>2</sup> (...continued)

functions or having the management of a public office or department exercising administrative or governmental functions.” See 1 *Official Opinions of the Maryland Open Meetings Compliance Board* at 199, citing *Black’s Law Dictionary* 173 (6th ed. 1990). In reaching our decision, we relied in part on this definition of “board” in order to distinguish between a governmental entity and the board of directors of a private corporation.

<sup>3</sup> Article II, §40(e)(2) of the Baltimore City Charter, as amended by Chapter 387, Laws of Maryland 2001, requires that the Mayor and City Council appropriate at least an amount equal to the 40% of the proceeds of the City’s hotel room tax for “convention center marketing and tourism promotion.”

<sup>4</sup> The complaint also requested that we “require [BACVA] to provide timely notice and access to future Board meetings.” Even if we were to agree that our prior decision should be overturned, the Compliance Board is an advisory body and has no authority to compel compliance with provisions of the Act. See, e.g., Compliance Board Opinion 02-11 (July 12, 2002), slip op. at 2.

Section 10-502(h)(2), by its text, and in particular the use of the word “includes,” rather than the word “created” as used in Section 10-502(h)(1), is meant to merely allow for an informal means by which a public entity can create a “public body.” It is submitted that Section 10-502(h)(2) does not eliminate the threshold requirement that some governmental unit “creates” the entity alleged to be the “public body.” That is, Section 10-502(h)(2) merely expands the Act’s definition of “public body” to include entities that are created less formally than those created by the means set forth in §10-502(h)(1).

BACVA relied heavily on our 1996 opinion, emphasizing the conclusion that the “phrase ‘multimember board, commission or committee’ refers to entities that are part of government.” BACVA also cited a 1999 Court of Special Appeals decision, *Andy’s Ice Cream v. City of Salisbury*,<sup>5</sup> which accepted the proposition that BACVA is “an example of an entity (albeit one whose directors are selected by the Mayor of Baltimore and which receives partial funding from the City of Baltimore) which is not a ‘public body’ for purposes of the Open Meetings Act.” BACVA further argued that principles underlying *stare decisis* dictate that our prior opinion not be overturned. Finally, BACVA pointed out that, since issuance of our opinion, the Legislature has declined to override our interpretation notwithstanding ample opportunity to do so.

BACVA also took issue with the three justifications set forth in the complaint for reversal of our prior opinion. In terms of its performing a governmental function, BACVA noted that the Open Meetings Act does not define “public body” by reference to an entity’s functions. Moreover, BACVA pointed out that the Baltimore City Charter provision cited in the complaint does not create BACVA or provide for the appointment of its members. Nor does it compel or direct any expenditure through BACVA. As to BACVA’s reliance on the City for financial services generally reserved for quasi-governmental agencies and BACVA’s “performing a mandated function,” BACVA argued that these factors are not determinative as to whether an entity is a “public body” as defined in the Act. Furthermore, BACVA noted that it has paid the City for payroll and accounting services provided on BACVA’s behalf.<sup>6</sup> Finally, as to the suggestion that

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<sup>5</sup> 125 Md. App. 125, 724 A. 2d 717, *cert. denied*, 353 Md. 473, 727 A. 2d 382 (1999).

<sup>6</sup> BACVA also noted that it intends to obtain from private sources services currently provided by the City Finance Department or handle them in-house at the end of the current  
(continued...)

§10-502(h)(2) extends to “all boards ... that are part of government or perform government duties prescribed by law regardless how they are created,” BACVA noted that neither the Court of Special Appeals nor the Compliance Board has ever adopted this interpretation.

## II

### Effect of Prior Opinion

The complaint requested that we overrule a prior opinion. BACVA responded, in part, that we should not do so because of the principle of *stare decisis*. *Stare decisis* (“to stand by things decided”) is a judge-made doctrine, aimed at achieving a settled body of law by emphasizing respect for precedent. As an administrative body authorized only to issue advisory opinions, we do not necessarily agree that we are bound by *stare decisis* to the extent that BACVA implies. *See* 2 Am. Jur. 2d *Administrative Law* §383 (1994). To be sure, in interpreting the Open Meetings Act, we have always attempted to be consistent in our opinions in order that public bodies can rely on our decisions to further compliance with the Act. We are not precluded, however, from altering our view based on subsequent developments that have eroded the basis for a prior opinion, or if, on further reflection, we determine that our prior reasoning was wrong.

## III

### Analysis

#### A. Private Entities

The substantive as well as procedural requirements of the Open Meetings Act are phrased in terms of the obligations of “public bodies.” *See* 10-502(h).<sup>7</sup>

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<sup>6</sup> (...continued)  
fiscal year.

<sup>7</sup> The Open Meetings Act defines, “public body,” in part, as:

- (1) ... entity that:
  - (i) consists of at least 2 individuals; and
  - (ii) is created by:
    - 1. the Maryland Constitution;
    - 2. a State statute;
    - 3. a county charter;

(continued...)

Applying this definition, we have consistently interpreted the Act as applicable solely to governmental or quasi-governmental entities. Thus, for example, in one of our earliest opinions, we held that the governing board of a private hospital was not regulated under the Open Meetings Act. Compliance Board Opinion 92-2 (October 23, 1992), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 6. See also Compliance Board Opinion 95-4 (August 14, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 120 (Maryland Association of Election Officials is not a “public body”). Cf. Compliance Board Opinion 97-3 (April 16, 1997), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 212 (Enoch Pratt Free Library Board of Trustees is a “public body”).

The Open Meetings Act begins with a broad legislative public policy pronouncement, §10-501, addressing citizens’ ability “to witness the phases of deliberation, policy formation, and decision making of public bodies [to ensure] the accountability of government...” and acknowledges that “conduct of public business in open meetings increases the faith of the public in government....” §10-501(b) (emphasis supplied). The Act was never intended to apply to private entities.

### **B. Creation of Entity**

In evaluating an entity’s status for purposes of the Act, “the first and often determinative step ... is to review the basis for the entity’s existence.” Office of the Maryland Attorney General, *Open Meetings Act Manual* p. 3 (4th ed. 2000). As a general rule, whether or not an entity is governmental or quasi-governmental is evidenced by the instrument that created it. See, e.g., Compliance Board Opinion 99-1 (January 7, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 35.

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<sup>7</sup> (...continued)

4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of the State.

(2) "Public body" includes:

- (i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, if the entity includes in its membership at least 2 individuals not employed by the State or a political subdivision of the State; ...

§10-502(h)(1) and (2)(i).

The Act's definition of a "public body" recognizes entities established in one of two ways. First, an entity may be created by the Constitution, by a legislative enactment, or any other legal instrument enumerated in §10-502(h)(1). Alternatively, the definition includes "any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision," provided that the membership includes at least two individuals not employed by the State or political subdivision. §10-502(h)(2)(i).

Under either branch of the definition, a "public body" must be a governmental entity if the Act is to apply. Thus, the governing body of a private entity is not a "public body" for purposes of the Act merely because it receives governmental funds. Compliance Board Opinion 97-3 (April 16, 1997), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 212, 216 n. 4. Nor, for example, would the board of a private entity become subject to the Act simply by performing a governmental function pursuant to a contract with the State or local government.

### **C. *Private Corporations Under Governmental Control***

A corporation formed under the State's general corporation law would not normally be subject to the Act. Even if the chief executive of the State or local government is given authority to appoint the board members of a private corporation, the character of the corporation is not normally changed. *See, e.g., Blind Industries and Services of Maryland v. Maryland Dept. of General Services*, 371 Md. 221, 224-25, n. 2, 808 A. 2d 782 (2002). However, when a governmental entity is instrumental in establishing a private corporation and maintains sufficient control, the answer may differ. As the Court of Special Appeals has indicated:

A private corporate form alone does not insure that the entity functions as a private corporation. When a private corporation is organized under government control and operated to carry on public business, it is acting, at least, in a quasi-governmental way. When it does, in light of the stated purposes of the statute, it is unreasonable to conclude that such an entity can use the private corporation form as a parasol to avoid the statutorily-imposed sunshine of the Open Meetings Act.

*Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 154-55.

*Andy's Ice Cream* involved the application of the Open Meetings Act to the Salisbury Zoo Commission, an entity incorporated under the general corporation law rather than any legal instrument listed in §10-502(h)(1). The Zoo Commission was clearly created by the City. Although the Zoo Commission selected its own

chairman, the members of the Zoo Commission were appointed by the Mayor and City Council. Furthermore, the City retained a significant level of control.

The purpose of the corporation was “[t]o assist the City ... in the *operation, management and promotion* of the Salisbury Zoological Park....” (emphasis in original). The City’s municipal attorney filed the articles of incorporation and the City’s executive director was named as its resident agent, using the City’s government office building as the applicable address. The City’s Public Works Director and Zoo Director were both ex-officio members of the Commission. Any change in the Zoo Commission’s articles or bylaws required approval by the Mayor and Council, and the Mayor and Council retained independent authority to alter the corporate bylaws. Furthermore, the Mayor and Council could abolish the Zoo Commission at will. Upon dissolution, any assets of the Zoo Commission would pass to the City. 125 Md. App. 125, 131-134.

Had the Council passed a resolution instructing the City’s staff to file the articles of incorporation, or had the Mayor issued an executive order with the same effect, the Court suggested that the Zoo Commission would have apparently met the definition of a “public body” under §10-502(h)(1). 125 Md. App. at 145. However, the Court focused on the second aspect of the definition, §10-502(h)(2). Recognizing the appointment authority of the Mayor and City Council, the issue was whether the Zoo Commission was a “board, commission, or committee” for purposes of §10-502(h)(2). Quoting our 1996 opinion, the Court agreed that §10-502(h)(2) “was intended to encompass, in the Compliance Board’s words, ‘those entities that are themselves governmental or quasi-governmental ... even if the Governor or the local executive chose to create a particular board, commission, or committee by informal means, instead of executive order.’” 125 Md. App. at 154. Given the purpose of the Zoo Commission and the decree of control that the Mayor and City Council exercised over the Commission, the Court concluded that the Zoo Commission “was organized and has functioned as an extension or sub-agency of the City government.” 125 Md. App. at 157. Thus, it was subject to the Open Meetings Act.

#### ***D. Analysis of BACVA’s Status***

In Compliance Board Opinion 96-14, we reviewed the history of BACVA, its initial incorporation, and a 1995 corporate charter amendment vesting appointment authority in the Mayor.<sup>8</sup> The Mayor was also empowered to designate the chairman of the board. 1 *Official Opinions of the Maryland Open Meetings*

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<sup>8</sup> Prior to the 1995 amendment, it is our understanding that the Mayor named one member to the then-15-member board while the convention bureau appointed 14 members pursuant to a contractual arrangement between the City and BACVA.

*Compliance Board* at 198. In its response, BACVA informed us that this arrangement remains in place.

BACVA can clearly be distinguished from the Zoo Commission in terms of their respective origins. Unlike BACVA, the Zoo Commission was established by the municipality itself, and Salisbury retained a significant decree of control from the Commission's inception. Nonetheless, the Court's reasoning in *Andy's Ice Cream* confirms that we may not limit our analysis to the origins of an entity, for the governing body of an originally private entity performing a governmental function could be transformed into a "public body" that is subject to the Open Meetings Act if a sufficient level of governmental control had resulted. In fact, in our 1996 opinion, we recognized the possibility that subsequent developments might transform a privately incorporated entity into a governmental one for purposes of the Act. 1 *Official Opinions of the Maryland Open Meetings Compliance Board* at 214, n. 2. Hence, in light of the factors emphasized in *Andy's Ice Cream*, we re-evaluate BACVA's status.<sup>9</sup> Our focus is on the degree of control that the City exercises over BACVA.

As a result of the 1995 amendment to its articles of incorporation, the Mayor can exercise considerable influence by appointing BACVA's board of directors and designating its chairman. And, like the Zoo Commission, another City official serves on the BACVA board.<sup>10</sup> Furthermore, like the Zoo Commission, BACVA apparently relies on City government for certain support services, although we are told that BACVA reimburses the City for such services. Moreover, the City of Baltimore lists BACVA among "quasi-city agencies" on the City's web site.<sup>11</sup>

Nevertheless, there are key differences distinguishing BACVA and the Zoo Commission. Most significantly, in our view, is the direct and ongoing control that the City of Salisbury built into the articles of incorporation and by-laws of the Zoo Commission. In matters of fundamental corporate governance, like the contents of the Zoo Commission's bylaws, Salisbury had explicit control. Salisbury did not have to rely on the good will of the board to achieve Salisbury's objectives. Indeed,

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<sup>9</sup> There appears to be no question that BACVA does not meet the definition of a "public body" under §10-502(h)(1). Thus, we limit our reconsideration of BACVA's status under the second aspect of the definition, §10-502(h)(2).

<sup>10</sup> While a member of the Baltimore City Council serves on the BACVA board, it is not clear in the record before us whether BACVA's bylaws provide that a Council member is to be included on the BACVA board or whether her appointment is unconnected to her position as Council member. The articles of incorporation do not require the appointment of a Council member.

<sup>11</sup> <http://www.ci.baltimore.md.us/government>



because Salisbury had the authority to dissolve the Zoo Commission at will, Zoo Commission board members could not possibly act with genuine independence.

Baltimore City simply does not have similar control over BACVA.<sup>12</sup> As we pointed out in our 1996 opinion, BACVA board members owe a fiduciary duty to the corporation. 1 *Official Opinions of the Maryland Open Meetings Compliance Board* at 200. The BACVA board, not the City, has authority over corporate governance. Further, in the incorporation of BACVA, the corporate board was given perpetual succession. Thus, unlike the Zoo Commission, BACVA's continuance is not at the sole discretion of the City. *Contrast A.S. Abell Publication Co. v. Mezzanote*, 297 Md. 26, 38, 464 A. 2d 1068 (1983) (Maryland Insurance Guaranty Association can be effectively controlled by State because its board is not self-perpetuating.)

In our view, the role of Baltimore City in the operations of BACVA does not reach such a level of control as to transform BACVA, an entity established as a private corporation, into a component of City government. Obviously, BACVA seeks to advance the City's interest in tourism, convention trade, and the like. But this is so because the private business interests that formed BACVA share the same interest. BACVA is a close ally of the City and is strongly influenced by the City, but in our view these facts have not transformed BACVA into a City instrumentality.

### III

#### Conclusion

We affirm our 1996 opinion concluding that BACVA is not a public body for purposes of the Open Meetings Act.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim, Jr.*  
*Courtney McKeldin*  
*Tyler G. Webb*

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<sup>12</sup> In *Andy's Ice Cream*, the Court relied on other factors in exploring the nexus between Salisbury City government and the Zoo Commission, such as budgetary control – factors about which we lack sufficient information to attempt a comparative analysis. Nevertheless, because Baltimore City's control over BACVA falls far short of that of the Salisbury City government over the Zoo Commission, we find such a comparison unnecessary.